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United Nations Commission on International Trade Law Thirty-fifth session

Summary record (partial)* of the 756th meeting**

Held at Headquarters, New York, on Friday, 28 June 2002, at 10.30 a.m.

Chairman: Mr. Joko Smart (Sierra Leone)

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Finalization and adoption of the draft UNCITRAL Model Law on International
Commercial Conciliation (*continued*)

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- * No summary record was prepared for the rest of the meeting.
 - ** No summary records were issued for the 753rd to 755th meetings.

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The meeting was called to order at 10.45 a.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (continued) (A/CN.9/XXXV/CRP.1/Add.7-12 and CRP.2)

1. **Mr. Morán Bovio** (Rapporteur) introduced the remaining sections of the draft report concerning the discussion of the draft Model Law (documents A/CN.9/XXXV/CRP.1/Add.7-12) as well as the finalized version of the draft Model Law (document A/CN.9/XXXV/CRP.2).

Draft Model Law on International Commercial Conciliation (A/CN.9/XXXV/CRP.2)

2. **Ms. Sanderson** (Canada) said that the word "exécutoire" in the French version of draft article 14 should be replaced with "susceptible d'exécution".

3. *The draft Model Law on International Commercial Conciliation, as amended, was adopted.*

Finalization of the draft report (continued)
(A/CN.9/XXXV/CRP.1/Add.7-8 and 10-12)

Section II.B. Consideration of draft articles (continued)

Consideration of draft article 15. Enforceability of settlement agreement. Continuation of the discussion of article 3 (A/CN.9/XXXV/CRP.1/Add.7)

4. **Mr. Kovar** (United States of America) proposed a rewording of the opening sentence of paragraph 2, as follows: "It was observed that, as referred to in draft article 15, the form and content of the settlement agreement were not regulated". In particular, the phrase "the nature of the settlement agreement" in the current text was too vague and metaphysical. The end of the paragraph should be amended to "... some form of expedited enforceability, by equating a settlement agreement with an arbitral award or a judicial decision". With regard to the second sentence of paragraph 3, "the risk" should be replaced with "a number of risks, including ...". He asked whether it was standard practice to refer, as at the end of paragraph 3, to a specific comment made by a single delegation. In paragraph 5, he proposed to replace the term "adduction" with "presentation".

5. He suggested a series of amendments to paragraph 6, starting by replacing the word "nature" with "mechanism" at the end of the third sentence, for the phrase to read: "without specifying the mechanism of such enforcement". The sentence beginning "It was pointed out that those two words ..." should be deleted, since it failed to capture the full extent of the debate. He proposed that the following words should be inserted in its place: "It was pointed out that the Model Law provided no new regulations concerning the formation of settlement agreements or their enforcement, and left those matters to be determined in accordance with the applicable municipal law. In this connection, it was noted that some States considered settlement agreements to be subject to the same rules of formation and enforcement as other commercial contracts, while other States had special regimes regulating these matters; including, in some States, mechanisms for expediting execution of settlements. Accordingly, the Model Law was neutral in this regard. In recognition of these differences the Model Law includes at the end of article 15 words in italics stating that an enacting State may insert a description or reference to its own system governing enforcement of settlement agreements".

6. In the sentence beginning "For example, 'enforceable' might be construed as indicating ...", it would be more appropriate to use the words "enforce other types of contracts" than "enforce an unspecified contract". The clause ", where the applicable law permitted" should be inserted at the end of the sentence that currently finished "agreement before a court to obtain its execution". Lastly, he proposed two amendments to the final sentence, inserting "issues of enforcement" instead of "issue of enforcement" and "or applicable municipal law" after "applicable law".

7. **Mr. Sekolec** (Secretary of the Commission), supported by **Mr. Chan** (Singapore), said that the words "for example" should not be deleted from the last sentence of paragraph 2, since it needed to be clear that there were other possibilities.

8. **Mr. Kovar** (United States of America) said that the phrase "contractual derogation" in paragraph 10 was inappropriate, especially given that the title of draft article 3 referred to "variation". Therefore it should be replaced wherever it occurred. On line 2, the words "were not open to contractual derogation" should be replaced with "the parties may not agree to vary", on line 3, "an extremely broad range of

unilaterally-decided exceptions" should be amended to "allowed for unilateral exceptions by a party" and, on line 6, "contractual derogations" should be amended to "making the provisions mandatory". In the following sentence, the words "there should be no contractual derogation to a provision" should be replaced with "parties should not be permitted to vary the application of a provision". Lastly, "being varied by the parties" should be inserted instead of "contractual derogation" in the final sentence.

9. With regard to paragraph 11, he proposed replacing the last clause "it was logically insusceptible to derogations" with "it was not logically susceptible to being varied by the parties". Paragraph 12 gave a very confused account of the possible conflict between article 3 and article 14, and should therefore be deleted entirely.

10. In paragraph 14, line 4, "contractual derogation to that rule" should be replaced with "agreement of the parties to vary that rule" and, on line 5, "contractual derogation" should be amended to "such agreement". It would be useful to add the following sentence at the end of the paragraph: "The view was also expressed that parties often turn to conciliation because of its non-binding nature, using it as a way forward from a dispute. Excluding article 15 from the possibility of variation by the parties would run counter to parties using conciliation for this purpose. It was also stated that excluding article 15 from the possibility of variation under article 3 would undermine the policy favouring party autonomy that was a basic premise of this model law".

11. **Mr. Tang Houzhi** (China) said he disagreed with the amendments proposed by the United States representative. He preferred to leave the text of A/CN.9/XXXV/CRP.1/Add.7 in the version prepared by the secretariat. In particular, he objected to the proposed deletion of paragraph 12.

12. **Mr. de Fontmichel** (France) said the amendments proposed by the United States made the text somewhat clearer. The French version of the existing text was clearer than the English, and moreover *dérégulation conventionnelle* was an acceptable rendering in French of the term "contractual derogation". He agreed with the representative of China that paragraph 12 should be retained, because it illustrated a very important problem, namely the

linkages between conciliation agreements and judicial proceedings, which could take place in parallel.

13. He did not support the last of the three additional sentences proposed by the United States to paragraph 14. A further reference to party autonomy would not make any difference. It was correct that recourse to conciliation was not obligatory in the absence of a contractual clause to that effect, but if an agreement had been reached between the parties to conciliate a dispute, that agreement was binding for them. Whether the parties could vary that agreement through a contractual derogation to a means of executing their agreement was a different matter entirely. Therefore, to include article 15 among the provisions open to variation would not change the position.

14. **Mr. Markus** (Observer for Switzerland) also preferred to retain paragraph 12. He agreed with the United States representative that the explanation in that paragraph of the interaction between articles 3 and 14 was confusing. Nevertheless, paragraph 12 accurately conveyed the sense of the discussion which had taken place in the Commission. It could perhaps be redrafted to make for easier reading. In the penultimate sentence, the references to articles 3 and 14 should be reversed.

15. **Mr. Chan** (Singapore) said the discussion reflected in paragraph 12 had in fact taken place, and it would be inappropriate to strike it from the record merely because it was difficult to convey succinctly. The paragraph might be improved by some redrafting, but must be retained.

16. **Mr. Kovar** (United States of America) said that to reverse the references to articles 3 and 14, as suggested by the Observer for Switzerland, would completely change the meaning. However, he could agree on the retention of paragraph 12, subject to some redrafting by the secretariat. As for paragraph 14, he could agree with the representative of France that the last of the additional sentences he had proposed was probably redundant, but hoped the other two sentences, which reflected points made in the discussion, would be adopted.

17. **The Chairman** said it was the general view that paragraph 12 should be retained, subject to redrafting by the secretariat. The first two additional sentences to paragraph 14 appeared to meet with general approval. The third did not, nor did the amendments proposed by the United States to paragraph 8, except for the proposal to substitute "mechanism" for "nature" in

paragraph 6. All the other amendments proposed by that delegation appeared to be acceptable.

18. Paragraphs 1-3 were adopted.

19. Paragraph 6 was adopted, subject to redrafting.

20. Paragraphs 7-11 were adopted.

21. Paragraph 12 was adopted, subject to redrafting.

22. Paragraphs 13-15 were adopted.

23. Document A/CN.9/XXXV/CRP.1/Add.7, as amended, was adopted.

Footnote 1 to draft article 1 (A/CN.9/XXXV/CRP.1/Add.8)

24. Document A/CN.9/XXXV/CRP.1/Add.8 was adopted.

Section II.E. Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (paras. 1-57 of the Guide) (A/CN.9/XXXV/CRP.1/Add.10)

25. Mr. Kavar (United States of America) said there was no mention in the draft report of the remark by the Chairman of the Committee of the Whole that the Secretary of the Commission could accept comments in addition to those made during the meeting. To reflect that remark, he suggested inserting in the last sentence, after "Commission", the words ", and any other suggestions".

26. In paragraph 3, he suggested substituting "thirty-fifth session" for "current session" in the first sentence, and continuing that sentence as follows ", taking into account comments and suggestions made in the course of discussion by the Commission, and other suggestions in the manner and the extent that the secretariat determined in its discretion". In paragraph 4, penultimate sentence, "was" should be replaced by "were". In the last sentence, he suggested replacing "describe more extensively" by "give more emphasis to". In paragraph 20, to reflect the emphasis placed on the need to make conciliation attractive to the reader, he suggested the addition of a new sentence at the end: "It was suggested that paragraph 36 should be redrafted to emphasize the intent to foster candid communication between each party and the conciliator".

27. Mr. Chan (Singapore) said that the practice described in paragraph 20 was not the procedure followed in many countries. He therefore proposed that the words "and valid if agreed upon by the parties"

should be deleted from the third sentence; that the current fourth sentence should be replaced by "The Model Law provision here is a recommendation for parties who do not have such a rule, and this is consistent with the UNCITRAL Conciliation Rules"; and that the word "clear" should be deleted, the word "revealed" replaced by "disclosed to the other party" and the words "specifically instructed" replaced by "informed" in the fifth sentence. He endorsed the amendments to the remainder of the paragraph which had been proposed by the United States delegation.

28. Mr. Sekuler (Secretary of the Commission), supported by Mr. Chan (Singapore), suggested that the new fourth sentence should be further amended to state that the Model Law provision was a recommendation for "States" rather than "parties".

29. Mr. Zacher (Observer for Australia), supported by Mr. Tang Houshi (China), endorsed the amendments proposed by the delegations of the United States of America and Singapore.

30. Document A/CN.9/XXXV/CRP.1/Add.10, as amended, was adopted.

The meeting was suspended at 12.10 and resumed at 12.25

Section II.E. Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (paras. 58-76 of the Guide) (A/CN.9/XXXV/CRP.1/Add.11)

31. Mr. Kavar (United States of America) proposed that a comma and the words "recognizing that in certain systems the term 'law' includes not only texts of statutes, but also court decisions" should be added after the word "Guide" in the penultimate sentence of paragraph 4. Furthermore, in the final sentence of paragraph 6, the first reference to "data messages" should be placed in quotation marks and made singular rather than plural, the words "was necessary" should be replaced by "appeared in a footnote" and the last two words should be deleted.

32. Mr. Sekuler (Secretary of the Commission) said that he did not recall a decision to relegate clarification of the meaning of the term "data message" to a footnote; however, that could be done if the Commission so desired.

33. **Mr. Kovar** (United States of America) said that he was willing for the secretariat to take a decision on that point.

34. *Document A/CN.9/XXXV/CRP.1/Add.11, as amended, was adopted.*

Section II.E. Draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (paras. 77-81 of the Guide) (A/CN.9/XXXV/CRP.1/Add.12)

35. **Mr. de Fontmichel** (France) proposed that the word "*pluripartites*" should be replaced by "*multipartites*" and the words "*en particulier*" by "*notamment*" in paragraph 2 of the French text.

36. **Mr. Tang Houzhi** (China) said that paragraph 1 did not reflect the discussions held in the Commission. While it was true that some speakers had suggested that paragraphs 79 and 80 should be deleted, others had maintained that the examples given therein, several of which had been provided by his own delegation, were useful; the Commission had ultimately decided to retain both paragraphs.

37. **Mr. Kovar** (United States of America) said it was his recollection that the proposal to delete paragraphs 79 and 80 had been motivated by the fact that the language used therein did not give a full picture of international practice because it was based on the legislation of only two States. He therefore proposed that a new fifth sentence should be added after the sentence ending in "Model Law.": "It was suggested that examples based on the legislation of only two countries did not give a picture of the variety of approaches found in international practice and therefore should not be included."

38. **Mr. Tang Houzhi** (China) said that, according to his recollection, it was the observer for Switzerland who had stated that the examples given in paragraphs 79 and 80 were useful. The United States delegation had not raised any objection to those examples; it had merely suggested that examples from States which followed a different practice should also be included in order to achieve a balance.

39. **The Chairman** said that that was his recollection as well.

40. **Mr. Kovar** (United States of America) said that while his delegation had indeed made that suggestion, its original proposal had been to delete the two

paragraphs. It was his impression that, after discussion, it had been agreed that the secretariat would redraft the two paragraphs to make them more balanced. He therefore suggested that the secretariat should amend paragraph 1 of the document under consideration in order to reflect that discussion and its outcome and to achieve the balance mentioned by the representative of China.

41. *Document A/CN.9/XXXV/CRP.1/Add.12, as amended, was adopted.*

The discussion covered in the summary record ended at 12.45 p.m.